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The Board of Contract Appeals: A Historical Perspective

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The Board of Contract Appeals: A Historical Perspective

FOREWORD

THE BOARDS OF CONTRACT APPEALS: A HISTORICAL PERSPECTIVE

THE HONORABLE JERI KAYLENE SOMERS*

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INTRODUCTION

Traditionally, judges of the United States Court of Appeals for the Federal Circuit have authored forewords to this annual review of the Circuit's work. This year, the editors sought a slightly different perspective for this introduction. As a judge on the United States Civilian Board of Contract Appeals (and a 1986 graduate of the American University Washington College of Law), I was honored to be asked to write this foreword. I will discuss the history of the boards of contract appeals and their relationship to the Federal Circuit, focusing more on the factual background rather than the theoretical.

As authors have noted previously, the creation of the court pursuant to the Federal Courts Improvement Act of 1982 brought forth a forum different from every other circuit court in the nation. In particular, unlike the other circuit courts, the jurisdiction of the

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Federal Circuit is based entirely on subject matter, not geography. The Federal Circuit possesses exclusive jurisdiction to hear appeals in those subject matter areas assigned to it, with some limited exceptions.¹

Most appeals of government contract disputes come to the Federal Circuit from two different forums, the United States Court of Federal Claims and the boards of contract appeals. Although appellate review of government contract disputes represents only a small percentage of the Federal Circuit's docket, this does not mean that these disputes should be given short-shrift. As Professors Schooner notes in one of the articles contained in this edition of the law review, the U.S. Government spends more than \$500 billion annually through executive branch procurement contracts,² covered by the Federal Acquisition Regulation (FAR).³ This expenditure of Congressionally-appropriated funds is significant, and, not surprisingly, provides fertile opportunities for disputes. Many of these disputes are resolved at the agency level, but when this does not occur, the Court of Federal Claims or the agency boards of contract appeals decides these disputes. If the contractor or the Government is dissatisfied with the decision, either may appeal directly to the Federal Circuit.

I. HISTORICAL DEVELOPMENT

In looking at the development and use of appeals boards to decide government contract disputes, it is useful to review some basic principles of government contract law. The power of the Government to contract for goods and services arises from the Constitution, which impliedly assigns much of the contracting power to Congress.⁴ Statutes delegate this contracting authority to various department and agency heads, most of whom are employees of the executive branch.⁵ These departmental and agency heads delegate the authority to enter into contracts to contracting officers.⁶

Despite efforts to draft government contract provisions that accurately reflect the work to be performed, inevitably disputes will arise in the performance of government contracts. In order to

1. 28 U.S.C. § 1295 (2006).

2. Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contract Decisions*, 60 AM. U. L. REV. 1067, 1068, n.1 (2011).

3. See generally 48 C.F.R. §§ 1-9999 (2010).

4. U.S. CONST. art. I, §§ 1, 8.

5. HAROLD C. PETROWITZ, OPERATION AND EFFECTIVENESS OF GOVERNMENT BOARDS OF CONTRACT APPEALS, S. DOC. NO. 89-99, at 1-2 (1966).

6. *Id.*

permit the Government to procure goods and services without disruption to the mission, government contracts include unique clauses that permit the Government to obtain what it needs within the time needed. The standard disputes clause, working with other standard clauses such as the changes clause, prevents disputes from disrupting performance by giving the Government the contractual right to require the contractor to continue performance in the manner desired by the Government.⁷ These clauses give the Government the right to require the contractor to conform to the Government's interpretation no matter how reasonable the contractor's contrary interpretation may be; this ensures that the Government will not be prevented from receiving goods and services in a timely manner as a result of the dispute.⁸ In the absence of these unique clauses, the contractor could proceed to manufacture goods based upon its interpretation of the contract's requirements without regard to whether these goods will meet the Government's needs.⁹ Alternatively, the contractor could discontinue performance entirely and wait until the parties could resolve the dispute. In addition, if the Government decides after the contract award to change the specifications, it can require the contractor to manufacture the goods to be procured or the services to be rendered in accordance with the changed requirements, even if the parties disagree on how much of a price adjustment the contractor should receive for the change.

Thus, the development of what is known as the "changes" clause in contracts made it possible for the Government to unilaterally order changes in certain aspects of contract performance which the contractor agreed in advance to accept in return for the Government's promise to "equitably" adjust the contract price and contract performance period. As government requirements became increasingly more complex, additional provisions were added to contracts providing for "equitable adjustment" for specific problems that might arise during contract performance. For example, the changed conditions and suspension of work clauses of construction contracts and the government furnished property clause in supply contracts are additional examples of clauses unique to government contracts.

Some disputes were considered to "arise under" the contract. In those disputes, the contractor could be entitled to an equitable

7. Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39, 40 (1964).

8. *Id.*

9. *Id.*

adjustment resulting from some substantial alteration in contract duties by the Government. Other disputes were described as a breach to the contract, meaning that the contractor could claim that the Government's actions "breached" the contract, entitling the contractor to the classic common law remedy of unliquidated damages in a court action. With the addition of the unique government contract clauses, the area of possible breach by the Government leading to unliquidated damages decreased. In addition, the areas of possible "dispute" arising under the contract, leading to equitable adjustments, decreased.

The contracting officer is designated to act for the agency in contract matters.¹⁰ The contracting officer enters into contracts, modifies the contract as needed, and is the person to whom the contractor turns for resolution of all contract questions.¹¹ As government contracting increased in volume and complexity, the need for providing a method to appeal a decision of the contracting officer became apparent.¹² Agencies and departments created procedures enabling the contractor to appeal decisions of the contracting officer to the head of the agency or department.¹³ As the amount of contracting increased, the difficulty of handling significant numbers of appeals became apparent. The agency or department head began to delegate the contractual duty of hearing these appeals to authorized representatives for this purpose.

II. DEVELOPMENT OF AGENCY BOARDS OF CONTRACT APPEALS

The first case to address the authority of the head of an executive department to appoint an adjudicatory board to hear and decide contract claims was *United States v. Adams*.¹⁴ This case involved contracts awarded to Adams by a military official, the chief quartermaster, which required Adams to build and deliver to the Army a quantity of boats.¹⁵ As a result of allegations of fraud against the chief quartermaster, the Secretary of War suspended payments on all contracts issued by the chief quartermaster until an investigation

10. U.S. COMM'N ON GOV'T PROCUREMENT, 4 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 11 (1972).

11. *See id.* at 11-12.

12. *See, e.g., id.* at 13 (discussing a need for a "mechanism . . . to provide an improved means for review and settlement of contract disputes prior to the initiation of relatively expensive and time-consuming litigation").

13. *Id.*

14. 74 U.S. (7 Wall.) 463 (1868).

15. *Id.* at 465.

could be made.¹⁶ On October 25, 1861, the Secretary appointed a board of three commissioners to examine and report to him on all claims where payment had been suspended.¹⁷ The board issued a notice calling on all claimants to present claims and to provide evidence to support their claims.¹⁸ Adams presented a claim showing a balance due of \$183,500.¹⁹ The board granted his claim in part, awarding him \$20,196.²⁰ Thereafter Adams filed suit in the Court of Claims and obtained judgment for the unpaid balance.²¹ Ultimately, the Supreme Court reversed the Court of Claims and dismissed the petition.²² One of the arguments presented to the Supreme Court was that the Secretary of War had no authority to appoint a board to hear and decide claims.²³ The Supreme Court found such authority in his general statutory authority to administer the War Department.²⁴

Initially, the boards of contract appeals appointed by the heads of the various executive departments and agencies did not have any specific statutory basis other than the general authority of the department head, any more than did the board appointed by the Secretary of War in 1861. The first time an executive department established anything in the nature of a board of contract appeals to hear and decide appeals other than on an ad hoc basis was by the War Department during World War I.²⁵

On September 8, 1918, the War Department promulgated a standard contract disputes clause, providing:

Except as otherwise specifically provided in this contract, any claims, doubts or disputes which may arise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement, may be determined, upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary selects a board as his authorized representative to hear and

16. *Id.* at 464.

17. *Id.* at 465.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See generally* Adams v. United States, 2 Ct. Cl. 70 (1866), *rev'd*, 74 U.S. (7 Wall.) 463 (1868).

22. *Adams*, 74 U.S. (7 Wall.) at 482.

23. *Id.* at 476.

24. *Id.* at 477.

25. For a more comprehensive history of the development of one of the boards of contract appeals, specifically, the Armed Services Board of Contract Appeals, *see* Shedd, *supra* note 7, at 39. For a more general discussion of the history of the boards of contract appeals, *see* Senate Document 99 from the 89th Congress, a report by Harold C. Petrowitz entitled "Operation and Effectiveness of Government Boards of Contract Appeals." S. DOC. NO. 89-99, *supra* note 5, at 1.

determine any such claims, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination.²⁶

Pursuant to this clause, when the contractor exercised his election to appeal to the Secretary, the decision of the Secretary, or his authorized representative was "final and conclusive."²⁷

A. *World War I*

In November 1918, the Secretary of War established the War Department Board of Contract Adjustment, which became the administrative mechanism to implement the procedures set forth in the new disputes clause.²⁸ As originally constituted, the board was composed of lawyers recruited from civilian status and commissioned in the Army. As the workload increased, the board expanded to include civilian attorneys as board members. In August 1919, the board had twenty-two members, consisting of seven army officers and fifteen civilian attorneys.²⁹

The order creating the board authorized it "to hear and determine all claims, doubts, or disputes, including all questions of performance or nonperformance which may arise under any contract made by the War Department."³⁰ Under the rules of procedure adopted by the board, parties had the right to be heard and to present evidence.³¹ The hearing followed the procedures similar to a trial in a court of record with a verbatim transcript of the hearing. As the war ended one week after the establishment of the board, the majority of the appeals it considered arose out of contract termination settlements.³² In addition, it was given original jurisdiction to adjudicate claims that were related to "implied contracts" under the Dent Act.³³ In June 1920, the renamed War Department Claims Board merged with the Appeal Section of the War Department Claims Board that had been established to liquidate the tens of thousands of war claims that came within the purview of the War Department.³⁴ The completion of the

26. S. DOC. NO. 89-99, *supra* note 5, at 7.

27. *See id.*

28. Shedd, *supra* note 7, at 45.

29. *Id.*

30. S. DOC. NO. 89-99, *supra* note 5, at 13.

31. *Id.*

32. *Id.* at 7.

33. *Id.*; *see also* Pub. L. No. 65-322, 40 Stat. 1272 (1919).

34. Shedd, *supra* note 7, at 46 (citations omitted).

war claims settlement program brought an end to the War Department Claims Board; with the board dissolved in 1922, its powers and duties to determine claims were handed over to the Assistant Secretary of War.³⁵ The Secretary's office did not resurrect a contracts appeal board until 1942; however, the heads of each of the military branches created similar boards during this time.³⁶

The Secretary of the Navy also formed a board during World War I to resolve disputes between contractors and the bureaus, with the immediate need for the board to resolve the question of whether costs under cost-plus contracts for the construction of shipyard facilities and naval vessels were allowed.³⁷ In March 1917, the Secretary of the Navy formed the Department of the Navy Compensation Board, comprised of naval officers with backgrounds in engineering, management and accounting (notably, non-lawyers).³⁸ The board acted independently and answered only to the Secretary of the Navy.³⁹ Despite the end of the First World War, the Navy Compensation Board continued to function until 1944, when it was superseded by the Navy Department Board of Contract Appeals.⁴⁰

The lessons of the First World War highlighted to government officials the need for standard and coordinated contract procedures.⁴¹ The Interdepartmental Board of Contract and Adjustments, established within the Bureau of the Budget in 1921, sought to formulate a contract policy for uniform implementation throughout the government, and also sought to draft a uniform set of contract clauses for employment in contracts and lease agreements.⁴² The board, composed of high-level representatives from all throughout the federal government's various procurement agencies and departments, conducted hundreds of meetings before it was incorporated into the newly established General Services Administration in 1949, and renamed the Interdepartmental Procurement Coordinating Board.⁴³ The board succeeded in adopting a disputes clause and other standard contract clauses, but

35. *Id.*

36. S. DOC. NO. 89-99, *supra* note 5, at 7.

37. Shedd, *supra* note 7, at 47 (citation omitted).

38. *Id.* (citation omitted).

39. *Id.* (citation omitted).

40. *Id.* (citation omitted).

41. S. DOC. NO. 89-99, *supra* note 5, at 7-8.

42. *Id.* at 8.

43. *Id.*

failed to secure statutory approbation of those clauses, partially as a result of objections raised at the time by the Comptroller General.⁴⁴

B. *World War II*

“The expansion in defense contracting that preceded World War II brought to focus inadequacies of disputes procedures resulting from the earlier abolition of the War Department Board of Contract Adjustment.”⁴⁵ The Secretary of War designated a committee of officers to study and recommend a method for handling contract claims.⁴⁶ As a result of those recommendations, in August 1942, the Secretary of War issued a directive creating the War Department Board of Contract Appeals (WDBCA) patterned closely after the World War I Board of Contract Appeals.⁴⁷ At the same time, the department promulgated a revised disputes clause, made mandatory for all War Department contracts.⁴⁸ This clause required that appeals from contracting officers’ decisions be heard by the WDBCA as the Secretary’s representative, explicitly gave the contractor the opportunity to be heard and to offer evidence in support of his appeal, and make final decisions as to factual questions.⁴⁹

In 1944, the Acting Secretary of the Navy appointed new members to the still-existing Navy Compensation Board, authorized it to act as the agent of the Secretary of the Navy to hear appeals under Navy contracts, and to submit findings and recommendations to the Secretary.⁵⁰ The board then became the Navy Department Board of Contract Appeals, and by order of the Secretary, acted “as the agent and authorized representative of the Secretary of the Navy in hearing and considering” appeals under Navy contracts and to “decide the issue as fully and finally as the Secretary of the Navy might do.”⁵¹ The procedures and rules established for the Navy Board of Contract Appeals were tailored to closely match the structure of the WDBCA.⁵² “The establishment of these two appeals boards on a quasi-judicial basis began the ‘modern era’ of contract disputes procedure.”⁵³

44. *Id.* at 17 (citation omitted).

45. *Id.* at 18.

46. *Id.*

47. *See* Shedd, *supra* note 7, at 53 (citations omitted).

48. *Id.* at 54.

49. *Id.*

50. *Id.* at 56.

51. *Id.* (citation omitted).

52. *Id.*

53. S. DOC. NO. 89-99, *supra* note 5, at 19.

“When the National Security Act of 1947 abolished the War Department and created the Department of the Army and the Department of the Air Force, the name of the WDBCA was changed to the Army Board of Contract Appeals.”⁵⁴ This board “decided appeals under both Army and Air Force contracts.”⁵⁵ In 1949, by joint directive of the Secretaries of the Army, Navy, and Air Force, a new board was created as the result of a merger between the Army and Navy boards.⁵⁶ This board, called the Armed Services Board of Contract Appeals, continues to be in existence today.

C. The Development of Agency Boards of Contract Appeals in the Civilian Agencies

The Commodity Credit Corporation of the Department of Agriculture set up the first formal board of contract appeals in a civilian agency in 1946.⁵⁷ “The Atomic Energy Commission and the newly formed General Services Administration established contract appeals boards in 1950.”⁵⁸ Other agencies and departments established boards of contract appeals, and, at a high point in 1966, sixteen boards of contract appeals existed within the executive branch.⁵⁹

For approximately twenty-five years, resolution of contract claims and disputes generally followed the requirements of the standard disputes clause, which required a contractor to submit a claim to the contracting officer for resolution of all factual disputes arising under the contract, appeal to the agency head, and to continue performance of the contract.⁶⁰ The contractor would receive a trial type hearing before the agency board of contract appeals, with relief limited to that provided by the contract itself.⁶¹ A contractor dissatisfied with a board decision could, within the six-year period of limitations, petition for judicial review by invoking the Tucker Act jurisdiction of the Court of Claims or a federal district court if the amount in controversy did not exceed \$10,000.⁶² By statute enacted

54. See Shedd, *supra* note 7, at 56.

55. *Id.*

56. *Id.*

57. S. DOC. NO. 89-99, *supra* note 5, at 20.

58. *Id.*

59. *Id.*

60. See U.S. COMM’N ON GOV’T PROCUREMENT, *supra* note 10, at 12-13.

61. See George M. Coburn, *Claims Against the Federal Government—The Contract Disputes Act of 1978*, in CONSTRUCTION LITIGATION 537, 539-40 (Prac. L. Inst. Ed., 1981).

62. *Id.* at 540.

in 1954 and known as the Anti-Wunderlich Act,⁶³ agency board decisions on issues of fact were made final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence; there was no finality of agency board decisions on questions of law.⁶⁴ For money claims and disputes not reached by the standard disputes clause and contract adjustment provisions, such as claims for contract breach, the contractor was free to pursue his Tucker Act remedies in the Court of Claims or in a federal district court if the amount in controversy was less than \$10,000.⁶⁵ The courts had no power to grant a form of specific relief against the Government, such as declaratory judgment or injunction.⁶⁶

III. CONTRACT DISPUTES ACT OF 1978

Effective March 1, 1979, the Contract Disputes Act of 1978 (CDA) changed the claims resolution procedure for government contract disputes. In essence, the range of disputes to be presented to the contracting officer expanded, and the Act required the contractor to certify claims over a certain dollar value.⁶⁷ The contracting officer's decision on disputes claims is final unless the contractor appeals to the agency board of contract appeals within ninety days,⁶⁸ or commences suit in the Court of Federal Claims within twelve months.⁶⁹ The agency boards of contract appeals are created by statute and are given the same powers of the Court of Federal Claims in deciding contract claims.⁷⁰ The contractor is entitled to payment of interest on amounts due from the date the contracting officer received a disputed claim (properly certified if so required) until payment.⁷¹ The CDA gave the Government the right to appeal decisions as well.

Members of agency boards are "selected and appointed to serve in the same manner as administrative law judges pursuant to section 3105 of Title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five

63. 41 U.S.C. §§ 321-22 (1976).

64. Coburn, *supra* note 61, at 540.

65. *Id.*

66. *Id.* at 541.

67. See 41 U.S.C. § 7103(b)(1) (Supp. 2011).

68. *Id.* § 7104.

69. *Id.* § 7107.

70. *Id.* § 7105(e).

71. *Id.* § 7109.

years' experience in public contract law."⁷² The jurisdiction of the agency boards of contract appeals is statutory, and does not depend on the presence of the disputes clause in the contract.⁷³

In early 1979, following enactment of the CDA, "the chairpersons of the 12 existing agency boards of contract appeals convened and drafted the "Uniform Rules of Procedure for Boards of Contract Appeals."⁷⁴ At the same time, the Office of Federal Procurement Policy (OFPP) tasked this working group to draft two charters."⁷⁵ The first envisioned an organizational structure to establish a single government-wide board of contract appeals. The second showed "an organizational structure to establish two separate boards of contract appeals: an armed services (or Department of Defense) board closely modeled after the existing Armed Services Board of Contract Appeals (ASBCA) and a civilian agency board encompassing all executive agencies other than the Department of Defense (DoD)."⁷⁶ "Neither of the two concepts of board consolidation" were "formalized or implemented for many years[,] due to vigorous objections raised by the individual agencies."⁷⁷

The government contract community repeatedly raised the issue of consolidating the boards, and, on March 19, 2002, "President George W. Bush proposed the consolidation of the eight existing civilian agency boards of contract appeals into a single civilian board as part of a comprehensive, thirteen-part agenda to help the nation's small businesses."⁷⁸ The justification for this consolidation focused upon the administrative burden upon small businesses "that may have to process contract disputes before the multiple agency boards."⁷⁹ No formal action had been taken upon the proposals at that time.⁸⁰

CONCLUSION

Ultimately, the civilian boards were consolidated, and the current Civilian Board of Contract Appeals was established by section 847 of the National Defense Authorization Act for Fiscal Year 2006 with little public notice or fanfare.⁸¹ The Act authorized the Civilian Board to

72. *Id.* § 7105(b)(2)(B).

73. *Id.* § 7105(c)(1).

74. Frederick F. Lees, *Consolidation of Board of Contract Appeals: An Old Idea Whose Time Has Come*, 33 PUB. CONT. L.J. 505, 506 (2004).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 507.

81. Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-92 (2006).

hear and decide contract disputes between government contractors and executive agencies under the provisions of the Contract Disputes Act of 1978,⁸² and regulations and rules issued under that statute.⁸³ The board's authority extends to all agencies other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority.⁸⁴

The consolidation has been extremely successful, optimizing the role the boards play in resolving contract disputes. The Civilian Board of Contract Appeals hears cases other than those arising under the CDA, incorporating the responsibilities that had been assigned to the separate agency boards prior to the consolidation. Meanwhile, the ASBCA, the Postal Service Board of Contract Appeals and the Tennessee Valley Authority continue to hear cases pursuant to their jurisdiction.

As history has shown, the boards of contract appeals have evolved over the years to meet the changing needs of the Government in its procurement activities. If past is prelude, then we can look forward to further developments in the years ahead. As the articles in this issue demonstrate, the continuing intellectual vibrancy of the field portends more changes and improvements in the years ahead.

82. 41 U.S.C. §§ 7101-09 (2011).

83. § 847, 119 Stat. at 3392.

84. *Id.*